



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Milsafe Enterprises, Inc.

File: B-239849; B-239851; B-239852

Date: October 2, 1990

Paul A. Peck, Esq., for the protester.
William P. Miller, for Excel Corporation, an interested party.
Eric Ching, for Palama Meat Co., Inc., an interested party.
Wendy M. Jones, for Meat & Poultry Association of Hawaii, an interested party.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency determination that procurements of beef for commissary stores should not be set aside exclusively for small business participation was reasonable where contracting officer did not have a reasonable expectation of receiving offers from two responsible small business concerns at reasonable prices because the solicitations contain requirements for multiple weekly deliveries to remote locations in Hawaii, for 24-hour product replacement and for local representatives, requirements which render performance cost prohibitive for firms without pre-existing large distribution systems in Hawaii.

DECISION

Milsafe Enterprises, Inc. protests the determination by the Defense Personnel Support Center, Defense Logistics Agency (DLA), not to set aside for exclusive small business participation request for proposals (RFP) Nos. DLA137-90-R-0834; DLA137-90-R-0835; and DLA137-90-R-0836, for market ready beef for commissary stores located in the Naval Station, Hickman Air Force Base, and the Army Schofield Barracks, all located in Hawaii. Milsafe contends that the contracting officer had a sufficient expectation of small business interest to warrant set-asides.

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We deny the protests.

An acquisition must be set aside exclusively for small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. Federal Acquisition Regulation (FAR) § 19.502-2. Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. FKW Inc., Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32.

Here, the record shows that in making this determination the contracting officer considered past participation of small business concerns in like procurements, conducted a telephone survey of small business firms, and evaluated the effect of certain increased service requirements under the present solicitations. The contracting officer noted that previous small business participation in similar procurements had been limited, usually consisting of only two or fewer such offers. The contracting officer also determined that if these prior solicitations had been set aside for exclusive small business participation, the government would have paid an additional amount in excess of \$74,000 for the products over a 10-month period. The contracting officer contacted five small business concerns by telephone, explained the additional requirements under these solicitations, and asked them if they intended to submit offers. Two of these firms indicated that the new requirements were too numerous, and that they would not submit offers. The remaining three firms indicated that they would submit offers, but noted that the new requirements would result in higher costs.

The most important reason for the contracting officer's determination was the potential cost impact on bidders located in the Continental United States (CONUS) in implementing the changed requirements under these solicitations. Specifically, these solicitations contain a requirement for multiple weekly deliveries, and for a local representative with authority to handle all contract administration matters, such as non-conformances, spoiled product disposition, and product replacement. Based on these additional requirements, the contracting officer concluded that a small business set-aside was not warranted because under such a set-aside offerors would be limited to CONUS-based small business suppliers, from whom there was no reasonable expectation of receiving products meeting the multiple weekly delivery requirements at fair and reasonable

prices. The contracting officer considered that the cost to cover the contingency of having to replace a nonconforming delivery would be prohibitive for these firms since in all likelihood the product would have to be flown to Hawaii on commercial aircraft.

The agency states that the new multiple weekly delivery requirements are considerably more expensive for CONUS-based firms than for Hawaiian firms because the arrival times of the four voyages per week from the west coast of the Continental United States to Hawaii occur between Sunday and Wednesday, and their deliveries often coincide. Generally commissaries can only accept two, or at the most three deliveries directly from these ships, because the commissaries do not have the capacity to receive, store and sell the needs of the entire week in such a short time-frame. As a consequence, they need suppliers who can receive and store the product when it arrives from the mainland, and deliver it to the commissaries over the course of the week. The contracting officer notes that while essentially all beef being furnished to the commissaries in Hawaii is furnished from the mainland, the same transportation problems affect CONUS-based firms more extensively than Hawaiian-based suppliers. This is because Hawaii-based distributors service many customers other than commissaries and already have in place a distribution system, including inventory in storage, and are thus less linked to the vagaries of the transportation system from the mainland.

The protester challenges the contracting officer's decision, arguing that it was based on inadequate and flawed information. Essentially, Milsafe contends that the contracting officer's telephone survey: (1) did not include one small business who was interested in submitting a bid; (2) mistakenly identified two qualified small business concerns as large businesses; (3) failed to account for Hawaii-based small business distributors; and (4) incorrectly assumed that small businesses would not be able to comply with multiple weekly deliveries, since one small business firm already does.

The telephone survey of five small business concerns did not by itself reasonably provide the basis for a determination not to set the procurements aside for exclusive small business participation. However, the contracting officer's determination was reasonably based primarily on the fact that small business firms' prices would be substantially affected by the multiple weekly delivery requirement and by the requirement for an Hawaiian-located authorized representative, which would render their prices too high to be considered reasonable. We note that even if Milsafe is

correct that there is one small business subsidiary distributor already in Hawaii which provides multiple weekly deliveries, the standard for an exclusive small business set-aside is that there be a reasonable expectation of at least two responsible small business concerns that will offer to perform at reasonable prices. In this regard, we further note that only three offers were, in fact, received in response to these solicitations, each of which was from a large business.

We find that the contracting officer reasonably determined to issue these solicitations on an unrestricted basis.

The protests are denied.


James F. Hinchman
General Counsel